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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 58

ALBERT ROVIARO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF FOR PETITIONER, ALBERT ROVIARO.

OPINION BELOW.

The opinion in the Court of Appeals (R. 141-145) is reported at 229 F. 2d 812.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 7, 1956 (R. 141). On March 7, 1956, the Court of Appeals denied the petition for rehearing (R. 146). The petition for certiorari was filed within thirty days thereafter and was granted May 21, 1956 (R. 146). The jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it reversible error to conceal and hide from the defendant the true identity of an informer and active principal participant in the acts complained of, who was described in the indictment and referred to by Government witnesses throughout the trial as "John Doe", although these witnesses admitted knowledge of "John Doe's" true identity? And where this concealment of identity of an active principal participant was accomplished by denial of a prompt request for particulars, and by complete and arbitrary denial of the right to cross-examine Government witnesses on the point, was not the defendant deprived of information as to the nature and cause of the accusation, and of a fair trial and due process of law?

2. Did the refusal to disclose the identity of "John Doe" an informer and active participant in the matters prosecuted, and failure to produce him as a witness, when the record indicated he was a favorable witness to the defendant, (R. 95) infringe upon and effectively destroy the accused's right to have compulsory process for obtaining witnesses in his favor?

3. Where it appeared from written entries upon a Government exhibit, and by testimony of a Government witness who made the entries, that a prior Government Agent witness had made oral statements contrary to his testimony on a crucial item of evidence, was it error to refuse a request for inspection of existing written statements of the Government Agent on this point?

4. Where a statute (Sec. 174 Title 21 U.S.C.) provides that "Whoever *fraudulently* or *knowingly* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, *knowing* the same to have been imported contrary to law," shall be punished; and further that "Whenever on trial for a violation of this subdivision the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury"; and the indictment charges that, "defendant herein, did then and there *fraudulently* and *knowingly* receive, conceal, buy and facilitate the transportation after importation of a quantity of a certain narcotic drug, . . . *knowing* the same to be imported into the United States contrary to law" (Emphasis supplied); can evidence of fleeting and inferential possession of a package for a matter of seconds, *without any proof of knowledge* of existence of narcotics therein, or fraudulent purpose, by defendant, trigger into effect the statutory provision that possession shall be sufficient evidence to authorize conviction, in a case where the defendant offers no evidence but relies on a motion for acquittal at the close of the Government's evidence?

5. Is it necessary for the Government's evidence to support or establish the inference of knowing or conscious possession of narcotics, before the burden of proof, or "burden of proceeding", shifts to the de-

fendant and requires him to explain possession to the satisfaction of the jury, in a prosecution for knowing and fraudulent possession of narcotics, knowing them to be imported contrary to law, in violation of Section 174, Title 21, U.S.C.A.?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 174 of Title 21, U.S.C., in effect during the period involved in this case, and in so far as pertinent, provided:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years."
>
> * * * * *
>
> "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 2554(a) of Title 26, U.S.C., in effect during the period involved, provided:

> "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

The Sixth Amendment to the Constitution of the United States, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Rules 7(c) and 7(f) of the Federal Rules of Criminal Procedure, provide:

> "(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."
>
> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten

days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

STATEMENT OF THE CASE.

The petitioner was convicted of violation of Section 2554(a), Title 26, U.S.C. and of Section 174, Title 21, U.S.C. in a trial by the Court, without a jury. The trial commenced on June 13, 1955, and all evidence was completed on that day. The Court took the matter under advisement and authorized the filing of briefs. On October 17, 1955, the petitioner's motion for judgment of acquittal at the close of the evidence was denied and the Court entered a judgment of guilty on the two counts of the indictment and sentenced the defendant to two years imprisonment and to payment of a fine of $5.00 on each count, the sentences to imprisonment to run concurrently.

On October 19, 1955, the trial Court overruled the petitioner's motion for new trial and fixed bond on appeal in the sum of $10,000.00, which bond was filed with the Clerk of the District Court.

Count I charges that the petitioner, Albert Roviaro, did on August 12, 1954, at Chicago, Illinois, sell to "John Doe" for a consideration, unknown to the Grand Jurors, a quantity of narcotics, not in pursuance of a written order from the said "John Doe" on a form issued by the Secretary of the Treasury; in violation of Section 2554(a), Title 26, U.S.C.

Count II charges that the petitioner, Albert Roviaro, on August 12, 1954, at Chicago, Illinois, did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after impor-

tation a quantity of a narcotic drug, knowing the same to be imported into the United States contrary to law; in violation of Section 174, Title 21, U.S.C.

The petitioner filed a Motion for Bill of Particulars which asked for the following information:

1. What is the name, address and occupation of the alleged purchaser described as "John Doe" in Count I of the Indictment?

2. On what date and at what time on said date did the alleged offense occur?

3. At what place, by street and number, did the offense or offenses charged in the Indictment occur?

The Prosecutor vigorously opposed this request for particulars, contending that "John Doe" was a mere informer and that secrecy as to his name and identity was important to the United States, and that the Government should not be required to disclose his identity.

The Court denied the Motion for the Bill of Particulars in all respects. (R. 3, 4)

EVIDENCE.

The evidence consisted of the testimony of four Government witnesses; Agent Norris M. Durham of the Federal Narcotics Bureau (R. 6-82); Chicago Police Officer Bryson (R. 83-104); Chicago Police Officer Sims (R. 105-116), and Federal Narcotics Agent Fields (R. 116-130).

Agent Durham described two meetings between the four Government witnesses and an individual described as "John Doe" on August 12, 1954, at 75th and Prairie Avenue in Chicago, Illinois (R. 7, 8). He stated that after the second of these meetings, which was at about

9:30 P.M., Detective Bryson climbed into the trunk of a Cadillac sedan which was owned and driven by "John Doe". A strip of metal was inserted into the trunk of the car so that it would not lock. "John Doe" then drove his Cadillac to a point at 70th Place and St. Lawrence Avenue, and at about 10:00 P.M., the Cadillac was parked in a position where it was in view of the other agents and officers, with Bryson remaining in the trunk and "John Doe" at the wheel. Bryson remained concealed in the trunk from 10:00 P.M. to 11:05 P.M. (R. 14-16).

Durham testified that at this time the petitioner, Roviaro, accompanied by an unknown man in a 1951 Pontiac sedan arrived at the corner and that Roviaro entered the Cadillac and took a seat next to the driver, "John Doe" (R. 16).

The witness then described a circuitous route of travel by the Cadillac to a point west of Champlain Avenue on 74th Street in Chicago. The witness stated that he had followed the Cadillac in a Government automobile in which he was the lone occupant, and that when "John Doe" stopped the Cadillac he left the Government car and continued to watch the Cadillac. The witness said that he then saw the petitioner leave "John Doe's" Cadillac, walk a few feet to an adjacent tree, where the petitioner bent over and picked up a small package which was dark in color. The witness said that he saw the petitioner turn and walk back to the Cadillac, the right front door of which was open, and make a motion as though leaving a package in the car. Durham said the petitioner then waved to "John Doe" and walked away from "John Doe's" Cadillac. These observations were made by the witness from a point about 100 feet away in the night-time between 11:00 and 12:00 P.M. (R. 17, 18).

The witness Durham said that he watched Roviaro, the petitioner, walk away from "John Doe's" Cadillac, and stated that he thereupon went to the Cadillac and in the presence of "John Doe", seated in the front seat at the driver's wheel, picked up a small package from the metal stripping on the floor of the front seat compartment, this strip being part of the door frame. The witness said that he then followed Roviaro to the street corner immediately West of this occurrence and saw him enter the Pontiac sedan, previously described, and ride away. On Durham's return to "John Doe's" Cadillac he found Officer Bryson sitting with "John Doe" in the front seat (R. 18-20). The witness identified Government Exhibit 2 (R. 19), a sheet of purple paper, as the wrapper of the package he had found in the Cadillac sedan and stated that it contained three cellophane envelopes, which later testimony showed contained a white powder, and it was stipulated later in the evidence, that a Government chemist, if called as a witness, would testify that this white powder was partly heroin (R. 31, 32).

According to Durham he met with Agent Fields and Police Officers Bryson and Sims at 69th and Cottage Grove shortly thereafter, at which time they conducted a field test on the contents of the package that the witness testified he had recovered. Thereafter, sometime after midnight, Officers Bryson and Sims and the witness went to the front door of the petitioner's home, several miles away from the occurrence, and rang the door bell. The petitioner answered the door bell in pajamas. Upon their demand for entry, the petitioner admitted the officers, and they placed him under arrest. After examination of his home and his money, they took the petitioner to a police station at 11th and State Streets in Chicago. The exam-

ination of the petitioner's home did not disclose the presence of any narcotics or other contraband (R. 24).

During his direct examination, in the course of introducing the exhibits, containing and pertaining to the narcotics, which Durham said he had recovered from "John Doe's" Cadillac, the witness Durham identified Exhibit 6 (R. 30) as an evidence envelope, into which the narcotics had been placed after seizure and examination. This envelope, upon its face, bears a form upon which entries were made describing the case, the contents and the manner in which the narcotics were acquired by the Government. This exhibit is certified as part of the record in this proceeding and is bound in the Transcript of Record immediately after the transcript of evidence (R. 131).

This Exhibit 6 (R. 131) has, entered upon it, the Treasury Department Case No., the name and address of the petitioner, a description of the heroin which it contained upon production at trial; and immediately following the printed words, "How Obtained," it bears the entry "Found by Officer James L. Bryson," "74th & St. Lawrence Ave., Chicago, Illinois, August 12, 1954, Time 11:15 P.M." Opposite the printed words "Amount Paid" there is an entry "None." The witnesses are shown as J. T. Fields, N. M. Durham, J. L. Bryson and G. T. Sims. The envelope further shows the agent reporting the case to be Norris M. Durham. Under the "Remarks" there is an entry stating "Ex. #1, weighed and sealed by Agent J. T. Fields, in the presence of Agent Durham, and delivered to the U. S. Chemist, Chicago, Ill., for analysis." On the reverse side of the envelope are two locking devices, and the handwritten entry "Weighed and Sealed, 2 oz. 389 grs. Heroin, Aug. 13, 1954, By J. T. F., witnessed 8/13/54 NMD."

On cross-examination the witness Durham stated that the only account he could give for the fact that Government Exhibit 6 contained the handwriting of Agent Fields to the effect that the package of heroin, which is the alleged subject of the offense charged, was found by Officer James L. Bryson at 74th and St. Lawrence Avenue, Chicago, Illinois, was that it must be an error on the part of Agent Fields (R. 49). He admitted that he had placed his initials upon the envelope, Government Exhibit 6, after Agent Fields had written the notation mentioned, and that the notation was inconsistent with his testimony (R. 49).

The witness further admitted that a conversation with the petitioner, which began prior to arrival at the police station, continued for some three or four minutes at the police station, and that during that conversation the man referred to as "John Doe" stated that he did not even know Roviaro, the petitioner. The Court struck this statement from the record (R. 52, 55).

The witness further admitted on cross-examination that he found no evidence of narcotics or contraband money in his examination of the home of the petitioner or upon his person. He further stated that the packages involved were examined for fingerprints and that neither the petitioner's fingerprints nor those of any one else were found upon the packages (R. 73).

Cross examination as to "John Doe's" identity or correct name was denied (R. 40-43).

Police Officer Bryson, called as a witness on behalf of the Government, stated that he was a Chicago Police Officer. He described a meeting with Durham, Sims and John Doe at 75th and Prairie Avenue at 5:00 P.M. on August 12, 1954, and stated that the Cadillac, which John Doe

was driving, was searched and that the person of John Doe was searched (R. 85).

The witness Bryson testified that he remained in the trunk of the Cadillac, driven by John Doe, from 10:00 P.M. on August 12th until 5 or 6 minutes after 11:00 P.M. At about 7 or 8 minutes after 10:00 P.M. someone got into the Cadillac and according to the witness, spoke to John Doe (R. 88). Over objection, this witness testified to conversation, which he said he heard from the trunk, between Joe Doe and a person in the front seat, while the car was in motion on the circuitous route described by Agent Durham.

The Court stated, at this point, "I think it is subject to objection unless the witness can testify he is familiar with the voice of the party in question." (R. 89). The conversation appears at Pages 90 and 91. The witness did not testify at any time that he was familiar with or knew the voices of John Doe or of the person who was the other party to the conversation.

Officer Bryson further testified that after the arrest of the petitioner, the petitioner was placed in a seat of an automobile, between Agent Durham and the witness Bryson and that conversation between the three (3) then occurred, during which Officer Bryson told the petitioner "We're going to put you down in this tank and let you see how these dope fiends live." He was further permitted to testify, over objection, that the petitioner had said that he knew nothing about any connection and said that he did not want to get anyone else in trouble. Bryson further said that the petitioner said "You got me." and "I've stood up twice before and I can stand up again." (R. 93).

On cross examination, Bryson stated that in continued conversation with the petitioner, at the Police Station, John Doe stated that he did not know the petitioner and had never seen him before.

Objection was sustained to cross examination as to the true name of John Doe and as to whether he was dead or alive.

George T. Sims testified on behalf of the Government that he was a Chicago Police Officer. He testified to the meetings on August 12, 1954 at 75th and Prairie Avenue and to the search of John Doe (R. 107).

The witness Sims stated that he saw Roviaro get into the parked Cadillac, driven by John Doe, in which Officer Bryson was concealed in the trunk (R. 108). The witness then said that he and Agent Fields followed the Cadillac in a separate car from that of Agent Durham, but did not follow it to the point where Agent Durham claimed to have seen the petitioner pick up a package from the ground (R. 109). He said that they did later see Roviaro board the Pontiac sedan near 74th and St. Lawrence and ride away.

Cross examination was denied on the subject of the identity of John Doe (R. 113, 114). Officer Sims said that John Doe remained in custody in the Police Station over night. The witness said that he did not know whether any charge was ever filed against John Doe and that he had never been called upon to testify against him; that he had seen John Doe a half a dozen times and that the last time was around Christmas (R. 116). Officer Sims appeared as a witness before the Grand Jury, but did not reveal John Doe's correct name to the Grand Jury (R. 116).

Agent Fields, a Federal Narcotics Agent, testified on behalf of the Government that he was present at the second (2nd) meeting of the Officers and John Doe at 75th and Prairie Avenue, at about 9:30 P.M. on August 12, 1954. He said that Agent Durham and he searched the interior of the Cadillac automobile which John Doe was driving, and that he saw Officer Bryson get into the rear trunk compartment of this car. He also stated that there was a search of the person of John Doe by Officer Sims and Agent Durham at this time (R. 118). This witness said that he saw the petitioner Roviaro get into the Cadillac, driven by John Doe. He did not see any alleged transfer of any package or material from the petitioner to any other person.

On cross examination, he stated that the information, which he wrote upon Government Exhibit 6 (R. 131), to the effect that the material enclosed (narcotics) was found by Officer James L. Bryson at 74th and St. Lawrence, was given to him by Agent Durham on August 13th (R. 123). He further stated that he was in several discussions and conferences with Bryson, Durham, Sims and John Doe from the time he had left 74th and St. Lawrence until he arrived at 11th and State Street, and that they did discuss the matters involved. He stated that he was told that nothing was paid in the transaction as it was described to him (R. 124).

Cross examination to the true identity of John Doe was denied upon objection by the Government (R. 125). The witness said that Exhibit 6 was not an official Government report, and that he considered the official report as a written report, prepared after the conclusion of an investigation, that there were other reports, written by Agent Durham, with regard to this transaction, but the witness did not know whether they coincide with the statement

by Durham to the witness Fields that the narcotic material was found by Officer Bryson at 74th and St. Lawrence Avenue (R. 126).

Counsel for the petitioner, at this point, requested Agent Durham's written statements and the Court sustained the Government's objection to such production (R. 127, 128).

It was stipulated that if the Government Chemist was called, he would testify that Government Exhibits 8, 9 and 10 contained material which assayed as 80.3 percent heroin and 6.4 percent morphine.

SUMMARY OF ARGUMENT.

I.

Contrary to the decision below, the activity of "John Doe", was more than that of a mere informer, and he was, in fact, an active principal participant in all of the events upon which the prosecution was predicated and upon which the conviction on either count was secured. His conduct permeated all of the events relied upon for conviction and under the evidence he was a participant in any alleged receipt, concealment, purchase and facilitation of transportation and concealment of narcotics in violation of Section 174, Title 21, U.S.C., relied upon for conviction under Count II.

Under *Portomene* v. *United States*, (C.A. 5), 221 F. 2d 582; *Sorrentino* v. *United States*, (C.A. 9), 163 F. 2d 627; and *United States* v. *Conforti*, (C.A. 7), 200 F. 2d 365, the identity of "John Doe" should not have been withheld from the petitioner.

The refusal to disclose the identity of "John Doe" by a bill of particulars before trial, and the recurring and complete denial of cross-examination concerning his identity, prevented a fair trial. The petitioner was denied the right of cross-examination on this material matter, and was effectively prevented from securing compulsory process for a witness in his favor (R. 95).

The denial of the motion for particulars, and of all information regarding the identity of "John Doe" infringed upon the defendant's right to be informed of the nature and cause of the accusation in violation of the Sixth Amendment, under the erroneous doctrine that where the indictment is sufficient under Rule 7(c), a bill of particulars is not the right of a defendant.

II.

Where a Government witness is contradicted upon a material matter by another Government witness, and by a writing upon an exhibit, and it appears that the witness who has been contradicted has made other extra-judicial written statements concerning the event in question, then a demand by the defendant for inspection of the extra-judicial writings of the questioned witness should be granted (R. 126-128). *Gordon* v. *United States,* 344 U.S. 414; *United States* v. *Krulewitch,* (C.A. 2), 145 F. 2d 76, 79; *United States* v. *Andolschek,* 142 F. 2d 503, 506; and *United States* v. *Coplon,* 185 F. 2d 629, 638.

III.

The statute involved in Count 2 of the indictment requires fraudulent and knowing conduct as an essential of violation (Section 174, Title 21, U.S.C.). The Count of the indictment involved charges knowing and fraudulent conduct (R. 2).

The authorization of conviction where possession by the defendant is proved, unless the defendant explains the possession to the satisfaction to the jury, must be construed to mean knowing and fraudulent possession, and the statute would be invalid because unreasonable and irrational if any unwitting possession of a package containing narcotics, without knowledge of its contents, and fraudulent purpose can sustain conviction. *Tot* v. *United States*, 319 U.S. 463, 467, 468. In the case at bar there was no proof of knowledge by the petitioner of the existence of any narcotics in the alleged transaction prosecuted.

ARGUMENT.

I.

The refusal of disclosure of the identity of "John Doe" an active principal participant in the transaction prosecuted, and the name as such in the indictment, deprived the petitioner of a fair trial; and denial of particulars concerning his identity vitiates Rule 7(f) of the Federal Rules of Criminal Procedure and infringed upon the petitioner's constitutional rights to be informed of the nature and cause of the accusation, and to have compulsory process for obtaining witnesses in his favor.

The indictment in this case contained two counts, both of which were based upon a single occurrence or transaction which the evidence indicates occurred completely between 11:00 and 12:00 P.M., on August 12, 1954. A single alleged transaction in narcotics was prosecuted in two counts because such a transaction as alleged would be violative of two separate statutes enacted by Congress, to-wit: Section 2554(a), Title 26, U.S.C.; and Section 174, Title 21, U.S.C. The first count of the indictment charged a sale of narcotics by the petitioner to "John Doe" on August 12, 1954, at Chicago, Illinois; and the second count charged that at the same time and place the petitioner did fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of a quantity of narcotic drug, knowing the same to be imported into the United States contrary to the law.

The petitioner made a prompt and timely request for particulars, in which he asked for the name, address and occupation of the person described as "John Doe" in the

indictment. The request for particulars was denied in all respects. The evidence of the Government showed that the person described in the indictment as "John Doe" and referred to by the Government witnesses throughout the trial, as "John Doe", was, in fact, an informer set up by the Government agents for the purposes of the offense prosecuted (R. 52).

The Government's evidence further showed that this informer, "John Doe", was more than a mere informer, that he was, in fact, an active principal participant in all of the events upon which the prosecution was based. The acts prosecuted by the Government in this case could not have been described without detailed testimony concerning the actions and conduct of "John Doe". No guilty conduct by the petitioner was described by any Government witness as having occurred prior to the petitioner's entry into the Cadillac automobile driven by "John Doe" on the night in question. The conduct relied upon for conviction, thereafter, consisted of the petitioner's ride as a passenger in the automobile driven by "John Doe" through the streets of Chicago to the point where the alleged transfer of narcotics occurred. At this point the petitioner left the automobile of "John Doe", and in full view of "John Doe" is alleged to have picked up a small dark package and presumably to have placed that package in "John Doe's" automobile at a place adjacent to where "John Doe" was sitting and within his reach. According to the witnesses, the petitioner then walked away from the automobile of "John Doe" leaving the package in "John Doe's" possession and control. Within seconds thereafter a package containing narcotics was recovered from "John Doe's" presence in his automobile by some agent or officer acting for the Government.

It is submitted that it is absurd to contend that "John Doe" was not a participant in the alleged activities of the petitioner relied upon for conviction under Count II of the indictment charging receipt, concealment, purchase and facilitation of transportation and concealment of narcotics.

There is no evidence to indicate the means whereby the package picked up by the petitioner was deposited in the parkway adjacent to the point where "John Doe" had driven his Cadillac automobile.

The Court of Appeals below has based its decision upon its conclusion at page 2 of its Opinion (R. 142) "John Doe" had nothing to do with the defendant's illegal possession or carriage of the package; he was not a participant in any sense of the word, in defendant's procurement and transportation of the package."

It is respectfully submitted that this holding by the Court of Appeals as a basis for decision, is a highly unreasonable construction of the status of "John Doe" in the event described by the Government's witnesses. It appears to be an adoption by the Court of Appeals of the desperate reasoning urged by the Government upon appeal, when it was recognized that reversible error had occurred by reason of the denial of the bill of particulars and the refusal to allow cross-examination concerning the identity of "John Doe". Was not "John Doe" an aider and abettor, or a conspirator acting in concert in the most indulgent view of the Government's evidence?

Of course, no one can gainsay the fact that "John Doe" was a person whose testimony could have thrown substantial light upon the events relied upon for conviction under each Count. The very failure of the Government to call this active participant in the affair indi-

cates that his testimony would have been favorable to the petitioner. This man, whose identity was concealed from the trial of facts and from the petitioner and, therefore, could not be the subject of subpoena by the trial Court or by the petitioner as a witness in the petitioner's favor, was an informer whom the Government had peculiarly within its power to produce. His testimony, without question, would have elucidated the transaction involved in both Counts. This gives rise to the presumption that his testimony would be unfavorable to the Government.

The following quotation is from *Scanlon* v. *United States*, 223 F. 2d 382 at 392, an opinion by Judge Hartigan of the Court of Appeals for the First Circuit, dated June 13, 1955:

> "In *Graves* v. *United States*, 1893, 150 U.S. 118, 14 S.Ct. 40, 37 L. Ed. 1021, the Supreme Court, although reversing a conviction because of prejudicial comment by the district attorney, stated at page 121 of 150 U.S. at page 41 of 14 S. Ct.: 'The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' This rule has been generally followed and consequently comments on the non-production of evidence which is peculiarly within the control of the other party have been allowed. 88 C.J.S., Trial, § 184; *Chesapeake & O. Ry. Co.* v. *Richardson*, 6 Cir., 1941, 116 F. 2d 860, certiorari denied 313 U.S. 574, 61 S. Ct. 961, 85 L. Ed. 1531; *Milton* v. *United States*, 1940, 71 App. D.C. 394, 110 F. 2d 556; See *Bell* v. *United States*, 4 Cir., 1951, 185 F. 2d 302, 309, certiorari denied 340 U.S. 930, 71 S. Ct. 492, 95 L. Ed. 671."

While the Government's fear for the disclosure of the identity of "John Doe" strengthens and bolsters to a conclusive degree the presumption that unidentified and missing "John Doe's" testimony would be favorable to the petitioner, the testimony of a Government witness is even more convincing.

Pages 94 and 95 of the Record contain the admission by Police Officer Bryson that "John Doe", when confronted by the petitioner, said that he did not know the petitioner and had never seen him before. This is the "John Doe" described by all witnesses as the driver of the Cadillac and the active participant in the acts prosecuted. Under the facts in this case the petitioner was deprived of information as to the nature and cause of the accusation by the denial of a bill of particulars. The denial of the right to cross-examine each of the Government witnesses as to the true identity of "John Doe" compounded this prejudicial error and worked destruction on the petitioner's right to a fair trial and due process of law (R. 9, 40, 103, 113, 116, 125, 126).

The Court of Appeals for three Circuits have passed upon the suppression of the identity of informers who were also active participants in the events prosecuted.

In *Sorrentino* v. *United States,* (C.A. 9) 163 F. 2d 627, it was held that the denial of information as to the identity of an active participant in the transactions prosecuted was error. However, since the record showed in that case that it was clear that the defendant knew the name of the informer, and that sufficient testimony established this beyond doubt, no prejudice arose, and therefore reversal was not required. In the case at bar the Government cannot point to the record and claim that the petitioner knew the name or identity of the informer.

United States v. *Conforti*, 200 F. 2d 365, is a decision of the Court of Appeals for the Seventh Circuit, which Court also decided the case at bar. In that case the Court of Appeals held that it was error to deny cross-examination as to the identity of an active participant informer but discovered that the identity was not actually requested. The Court said that had the proper questions been asked, the denial would have been prejudicial. In the case at bar, every one of the four Government witnesses were specifically asked for the true name of "John Doe" upon cross-examination, and in every case the Government's objection to such cross-examination was sustained.

The Court of Appeals for the Fifth Circuit recently decided the case of *Portomene* v. *United States*, 221 F. 2d 582. This decision discussed the *Conforti* and *Sorrentino* decisions, and reversed a conviction in a narcotics case because the defendant was deprived of information concerning the identity of an active principal participant, who also happened to be an informer.

The petitioner here respectfully urges that the decision in *Portomene* v. *United States*, (C.A. 5) 221 F. 2d 582, is a proper decision completely appropriate to the issues in this case, and it is urged that the decision of the Court of Appeals below, from which review is asked, is contrary to the decision in *Portomene* v. *United States*, 221 F. 2d 582, and that the conflict between the two decisions with the obvious difference in results, is apparent despite the attempts by the Government and the Court of Appeals below to distinguish this case from the *Portomene* decision. In the case at bar the Court of Appeals below has arbitrarily stated that it is not disputed that "John Doe" was not a participant in the petitioner's illegal possession charged in Count II. It

is apparent from the facts in the case at bar that this is not true.

Despite the fact that the petitioner did not take the stand in the case at bar, his case was submitted to the trial Court for decision upon his plea of not guilty. The Government's evidence showed that "John Doe" had the best position and opportunity for determination of the identity of the person who sat next to him in his Cadillac, and who retrieved a package of narcotics from the ground adjacent to "John Doe's" Cadillac and allegedly left it with "John Doe" in his Cadillac car, and he stated that the petitioner was unknown to him and that he had never seen him before (R. 95). This statement by "John Doe" was within an hour or two of the occurrences prosecuted. So it would appear that under any view of the evidence the petitioner's "position" was in dispute, even following the evidence of the Government agents.

The disclosure of "John Doe's" identity, which would have made possible his production of the witness, could have raised serious doubt as to whether any "possession" of any character had been found in the petitioner. It is obvious that the petitioner's defense was substantially prejudiced in so far as both counts were concerned because "John Doe's" participation in both alleged offenses was unquestioned and permeated the entire evidence relied upon to establish petitioner's culpability.

It is respectfully suggested that this conviction should be reversed upon authority of *Portomene* v. *United States*, 221 F. 2d 582, despite the efforts of the Court below to distinguish it from the case at bar.

Suppression of the informer's identity, without adequote justification, prevented the petitioner from produc-

ing him as a witness to give the favorable evidence indicated by his denial that he had carried on any transaction with petitioner, or knew him (R. 95). Issuance of a subpoena for "John Doe", without address or description, would be ridiculous and useless. The petitioner was denied the right to compulsory process for a specific witness in his favor by the trial court's support of the Government's concealment of this important participant witness whose testimony could have been vitally important.

It is further respectfully urged that the Federal Rules of Criminal Procedure suggest and contemplate sound exercise of liberal discretion in the issuance of bills of particulars for the purpose of affording the defendant fair notice of the nature and cause of the accusation against him, which may not be included or contained in "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is clear that an indictment may conform to the foregoing quotation from Rule 7(c) of the Federal Rules of Criminal Procedure and yet not afford a defendant fair notice of the nature and cause of the accusation. Such indictment is no more than "notice pleading". Among the safeguards provided for a defendant under such circumstances by the Rules of Criminal Procedure is an application for a bill of particulars. It would appear that the Court below, in the case at bar, have fallen into the error of considering that since the indictment met the requirement of "a plain, concise and definite written statement of the essential facts constituting the offense charged", (Rule 7(c)), therefore the grant or denial of a bill of particulars was a matter of whim, or desirability on the part of the prosecutor or trial Court rather than the considered, sound, liberal, exercise of discretion affording the constitutional right of the defendant to be informed of the nature and cause

of the accusation in accordance with the Sixth Amendment to the Constitution of the United States. Mere technical sufficiency of an indictment in short and streamlined form should not support denial of a request for a bill of particulars, but should indicate, on the contrary, the necessity therefor, in order to afford the defendant a fair trial, as required by due process of law, and the Sixth Amendment.

The elimination of the bill of particulars under the Federal Rules of Civil Procedure and the substitution therefor of "a motion for more definite statement" under Rule 12(e) of the Federal Rules of Civil Procedure, has been justified in most quarters by the existence of generous discovery procedures contained in Rules 26 to 37 of the Rules of Civil Procedure. However, in criminal cases the most effective of these discovery procedures is not available. The deposition process, for instance, is not available to the defendant in a criminal case, under all ordinary circumstances, in contrast to the aids and safeguards afforded the civil defendant under Rules 26 to 37 of the Civil Rules of Procedure. Rules 16 and 17 of the Federal Rules of Criminal Procedure are not an adequate or parallel protection for the defendant in a criminal case, denied proper particulars, where he has been charged in "plain, concise and definite" language of the statute, with no more factual detail.

A more important and fundamental reason for the grant of a bill of particulars, lies in the fact that the Sixth Amendment to the Constitution of the United States provides for the right of the accused "to be informed of the nature and cause of the accusation".

It is respectfully submitted that since it has been generally held that the statement of an offense in the language of the statute, as in the case at bar, would constitute

a sufficient indictment, only an indulgent and generous grant of particulars will afford to defendants the protection which is their right under the Sixth Amendment.

The Court is asked to hold that the denial of the bill of particulars in the case at bar was specific reversible error, and thus indicate some curb upon the growing practice of denying particulars because the indictment is held to be sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure. It is respectfully submitted that the denial of the bill of particulars in the case at bar and the continued refusal to disclose information necessary and pertinent to the preparation or presentation of defense was a violation of the petitioner's rights under the Sixth Amendment, as well as being contrary to the decisions cited heretofore.

II.

The denial of the petitioner's request for production of written statements and reports of an agent witness, who was proved to have made oral statements to an associate which contradicted his testimony on a crucial issue, was reversible error.

A substantial question concerning the truthfulness and accuracy of Agent Norris Durham and Officer Bryson developed when it appeared that Government Exhibit 6, an official evidence envelope, which was transmitted as part of the Record in this case, contained a notation that the narcotics involved in the case were "Found" by Officer Bryson rather than recovered by Agent Durham. This evidence contradicted the sworn testimony given by Agent Durham and Officer Bryson as Government witnesses.

Agent Fields testified that he had made the entries on Exhibit 6, and that Agent Durham gave him the in-

formation that the narcotics had been found by Officer Bryson on August 13, the day following the date alleged in the indictment (R. 123). Examination of Exhibit 6, (R. 131), shows that Durham placed his initials on the reverse side of the envelope, a d he testified that he had done this after the face of the envelope had been filled in. This statement on Exhibit 6 was contradictory of his evidence, by his own admission (R. 48, 49), and his only reason or explanation was mistake.

Agent Fields testified that there were other reports written by Agent Durham concerning the transaction which was the subject of the prosecution. He stated, however, that he did not know whether Agent Durham's written reports coincided with Duham's oral statement to Fields concerning the manner of acquisition of the narcotics involved (R. 126).

At this point counsel for petitioner requested permission to see Agent Durham's written statements concerning the transaction. The prosecutor stated that he did not have Durham's written statements with him in Court and asked if they could be produced the following morning (R. 127). The trial Judge stated "We are going to conclude this case today, gentlemen." After considerable argument the Court denied the request for production of these statements (R. 128).

If Agent Durham did not tell the truth concerning the finding of the package, then his entire story in its important parts is shattered. Certainly his testimony on this was material, in fact crucial. If he did not find the package in "John Doe's" automobile, what happens to the inference that it is the same one picked up by the petitioner? Did Durham substitute or confuse another package given him by Bryson? Did he forget the facts of the transaction prosecuted?

Certainly his written reports should elucidate or throw light on this point. Inspection of these reports, the existence of which was established by Agent Fields' testimony, would permit a determination of whether Agent Durham had made *additional* extra-judicial statements at variance with his sworn testimony. If these contradicted or varied from his testimony, the trial Court's and probably any Court's confidence in his testimony might be affected to a point where his entire testimony must be disregarded. He was not corroborated on the deposit of any package in "John Doe's" car, or on his testimony that he found it. He was impeached on this point by extra-judicial statement to Agent Fields (Ex. 6) (R. 131). The only possible fully corroborating witness was concealed and withheld from the Courts and the petitioner, by the Government, despite repeated and proper efforts of the petitioner, to secure disclosure.

It is respectfully submitted that in *Gordon* v. *United States*, 344 U.S. 414, the foundation laid for a request for production of documents was only slightly different, in facts, but is not distinguishable in principle.

In the case at bar the record shows by Agent Fields that the documents (Agent Durham's statements) were in existence, were in possession of the Government, were made by the witness whose credibility was in question; that the witness had made extra-judicial material statements contrary to his testimony, and the contradiction was on a relevant, material and important matter which directly bore on the main issue being tried, to-wit, did the petitioner deposit a package of narcotics in "John Doe's" auto, in "John Doe's" presence; and was that the package recovered by Durham from "Joe Doe's" presence and automobile or was Durham inaccurate or untruthful in his uncorroborated testimony?

The Court is asked to consider *Asgill* v. *United States*, (C.A. 4) 60 F. 2d 776; *United States* v. *Krulewitch*, (C.A. 2) 145 F. 2d 76, 79; *People* v. *Davis*, 52 Mich. 569, 18 N.W. 362; *People* v. *Bachman*, 41 Nev. 197, 168 P. 733; *People* v. *Schainuk*, 286 N.Y. 161, 164, 36 N.E. 422. These were said to be highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to production of such documents, in the unanimous opinion of the Supreme Court in the *Gordon* case, 344 U.S., 414, 419.

See also *United States* v. *Andolschek*, 142 F. 2d 503, 506, and *United States* v. *Coplon*, 185 F. 2d 629, 638.

The petitioner, as his conclusion on this point, adopts this quotation from *Gordon* v. *United States*, 344 U.S. 414, 419:

> "Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony untrustworthy persons'. (*People* v. *Davis*, 52 Mich. 569, 573, 18 N.W. 362)."

III.

The decision of the Court of Appeals that ANY possession of narcotics, even without knowledge, will justify conviction under Section 174, Title 21, U.S.C., is erroneous.

The Court of Appeals below has justified its affirmance of this conviction on the second count only, because under the Statute there involved, Congress has prescribed that possession of a narcotic drug shall be sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury (Sec. 174, Title 21, U.S.C.A.). (R. 142, 143)

The Count involved *charges* that the petitioner did *knowingly* and *fraudulently*, receive, conceal, buy and facilitate the transportation after importation of a quantity of narcotic drug, *knowing* the same to have been imported contrary to law. (R. 2) *United States* v. *Carll*, 105 U.S. 611, 26 L. Ed. 1135.

It is submitted that it cannot have been the intention of Congress to authorize conviction regardless of whether the petitioner was afforded a fair trial, if only the Government produced some evidence which might support an inference of any kind of possession. It is the petitioner's contention that substantial trial errors which infringe upon or deprive the accused of Constitutional rights, certainly could cause reversal in such a condition.

However, the petitioner further contends that the statutory authorization of *conviction* unless *the defendant* explains to the satisfaction of the jury, certainly is not properly based upon any illusory, fleeting possession, or, even upon an actual possession of a package which the circumstances in the evidence fail to show is a knowing possession of narcotics. It is far more than a mere evidentiary presumption, for who is to say what *explanation* by a *defendant*, on such a scandalous charge would *satisfy* a jury of twelve.

The question with which petitioner was faced at close of the Government's case, was whether conscious and knowing physical handling of a package containing contraband, without proof of knowledge of the contraband contents, can support and trigger into effect a statutory authorization of conviction of a knowing and fraudulent act. The Court below adopts the position that any type of possession will do.

In the case at bar there is no evidence in the record to support a contention that the petitioner had knowledge

of the contents of the package during the momentary handling of it by him. According to the Government's evidence he procured it from the adjacent ground for "John Doe" who remained in his Cadillac next to the place where the package was found, and his fleeting possession was for only the time it took to step back to the undisclosed informer's car.

If the petitioner did not know what was in the package, and no evidence shows that he did, then it is illogical and irrational to authorize his conviction of knowing and fraudulent possession of narcotics. It is suggested that the mere handling or possession of a harmless appearing package which gives no indication of its contents will not support the conclusion that a temporary handler or possessor has knowledge and purpose sufficient to convict. Otherwise the presumption of innocence has been destroyed, and the burden of proof beyond a reasonable doubt has been reduced to a shadowy feather.

It is a far more rational and reasonable conclusion to believe that the purpose of the statute was only to presume that *knowing* possession of narcotics would authorize conviction because of the presumption that the knowing possessor acknowledged that the narcotics were illegally imported, unless he explained lawful importation or legally authorized possession. This inference of the knowledge that the narcotics were illegally imported is reasonable and consistent with human experience. It was not contended by the Government in the Court below, that the evidence sustained in any degree a conclusion that the petitioner knew the contents of the innocent appearing package handled by him to have been narcotics, in the absence of indulgence in presumption. The Court of Appeals, in its opinion, has taken the position that proof of knowledge and fraudulent purpose are

unnecessary. Cf. *United States* v. *Di Re*, 332 U.S. 581, 593; and *Tot* v. *United States*, 319 U.S. 463, at 469.

In discussing possession in a stolen property case Mr. Justice Minton of the Supreme Court, while a Judge of the Court of Appeals for the Seventh Circuit, said in *United States* v. *Wainer*, 170 F. 2d 603 at page 606, "To 'possess' means to have actual control, care and management of and not a passing control, fleeting and shadowy in its nature. *State* v. *Cooper*, Mo. App., 32 S.W. 2d 1098, 1099."

The Supreme Court of the United States has said, "Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, Preliminary Treatise on Evidence (1878) cc 8 and 9; Wigmore, Evidence 3d ed. §§ 2490-2540; Morgan, Some Observations Concerning Presumptions (1931) 44 Harvard L. Rev. 906; Denning, Presumptions and Burdens (1945) 61 Law Quart. Rev. 379." (*Bollenbach* v. *United States*, 326 U.S. 607, 614).

In *Tot* v. *United States*, 319 U.S. 463, at Pages 467 and 468, the Supreme Court of the United States discusses the validity of legal presumptions, or presumptions of evidence as prescribed by State Legislature or the Congress of the United States. It hold that in every instance they must be reasonable and "cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the one in common experience". It is not reasonable to assume everyone knows the contents of any package he handles. On the other hand, if knowledge that the package contains narcotics is proved, knowledge of unlawful importation may be presumed reasonably.

It is respectfully submitted that the inferred and presumed, fleeting and shadowy possession established in the record in this case is an improper and unlawful basis upon which to trigger into effect a statutory presumption and rule of evidence relied upon by the prosecution.

In any event, it is clear and unequivocal that "John Doe" was a full, active participant, under the evidence, in all phases of the transaction and "possesion" relied upon. Under these circumstances, it was plain reversible error to deny the defendant a fair trial by refusal to disclose the identity of "John Doe" in a bill of particulars, properly requested, and to deny proper cross-examination of the Government witnesses concerning the identity of "John Doe", and to hinder and prevent the petitioner from securing a witness in his behalf.

See Justice Roberts' discusion of *Yee Hem* v. *United States*, 268 U.S. 178, 69 L. Ed. 904, and *Casey* v. *United States*, 276 U.S. 413, 72 L. Ed. 632, in the *Tot* decision, 319 U.S. 463, at pages 471 and 472. It is suggested and urged that the petitioner must be *proven to know* that he has possession of narcotics, and that then a presumption of knowledge that it was unlawfully imported takes effect, and authorizes conviction.

As interpreted below, the statute destroys the presumption of innocence, removes the burden of proof on an essential element of the offense, prescribed by statute and charged in the indictment, and places upon the accused a burden of proving his innocence to an indefinable standard or degree of proof, "the satisfaction of the jury".

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.